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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

MISTY CASTILLO, as Personal Representative of the ESTATE OF ARCADIO CASTILLO, III,

Plaintiff,

v.

NATHAN BUSH and CITY OF SALEM, a municipal corporation,

Defendants.

) Case No. 6:22-cv-00684-MK

)

) **DEFENDANTS' UNOPPOSED MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN RESPONSE TO PLAINTIFF'S UNAUTHORIZED FILING (ECF# 106)**

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Defendants respectfully move the Court for authorization to file a Supplemental Brief for the limited purpose of responding to Plaintiff's Notice of Supplemental Authority (ECF# 106). Plaintiff's "Notice" briefed the Court on Plaintiff's view of *Calonge v. City of San Jose*, 2024 WL 2873371, --- F.4th --- (9th Cir. 2024). While Plaintiff's filing was not proper (see below), Defendants do not move for any sanction,

however by this motion Defendants simply ask for the opportunity to offer their own explanation of *Calonge*.

POINTS AND AUTHORITIES

1. Plaintiff was required to seek leave of the Court.

“After a non-moving party has filed a brief in opposition to another's party's motion for summary judgment, leave of court is required before that party may file a sur-response or other supplemental brief in further opposition to the motion.” *Servo v. Junginger*, 2014 WL 3891751, at *3 (D. Or. Aug. 5, 2014) *citing* LR 7-1(f) and 56-1(b). In turn, LR 7-1(f) states that: “[u]nless authorized by the court, no further briefing is allowed other than the briefing allowed under LR 56-1(b).”

Applied here, briefing is closed, the Court has taken summary judgment under advisement and, critically, Plaintiff has already filed her Response to Defendants' Motion for Summary Judgment. Therefore, Plaintiff was required to seek leave of the Court before filing a new brief.

2. Plaintiff was required to confer on a motion seeking leave.

Even if Plaintiff had properly filed a motion, she was still required to confer with opposing counsel, which did not happen here. See LR 7-1(a). Plaintiff did not confer and did not certify conferral. Defendants' will not belabor this point: Plaintiff should have filed a motion, and Plaintiff should have conferred before filing anything. LR 7-1(a)(3).

3. Leave would not have been granted.

A leave to file the supplemental brief would have properly been denied. Courts in this district typically grant motions for leave to file supplemental briefs upon a showing

of good cause. *Servo*, at *3 (collecting cases). Good cause does not exist to bring a widely available, published decision of the Ninth Circuit to the District Court's attention.

The District Court is capable of locating precedent. This specific point was made during oral arguments regarding qualified immunity in this case. There is no reason to believe that the District Court is unaware of Ninth Circuit decisions. Plaintiff's motion would have sought leave to file a special, supplemental brief about a case that this Court is already presumably aware of—and that is not good cause.

4. In an alternative to striking the offending filing, Defendants should be afforded the opportunity to file a responsive brief.

There is no utility in asking the Court to strike the offending pleading because Plaintiff has already made her filing and briefed the Court on her version of *Calonge*. Because Plaintiff has “rung the bell,” and because Defendants cannot “un-ring” the bell, they respectfully pray for an opportunity to offer a response.

All of the parties to this litigation have an interest in the Court's best analysis and its best findings. The adversarial process is the traditional means of bringing competing theories to the Court for a decision. Plaintiff has now offered her own interpretation of *Calonge*, Defendants pray for the chance to offer their interpretation of the same matter. Defendants do not seek a sanction for Plaintiff's failure to seek leave of the Court, nor for Plaintiff's failure to confer; Defendants ask that, in the interest of fairness, they be afforded the opportunity to brief *Calonge*.

Finally, that should end the briefings. A reply brief on this matter is unnecessary. Assuming the Court allows Defendants to file a responsive brief, it will have already

expanded the allowable filings at summary judgment. No Reply is necessary, no reply was requested and, frankly, Plaintiff forfeited a reply when she filed a Supplemental Brief without leave of the Court instead of a motion seeking leave of the Court. LR 7-1(f).

5. Conclusion

Defendants move for an opportunity to respond to Plaintiff's Supplemental Brief. Given other more draconian options (like a motion to strike or other sanctions) Defendants' motion is reasonable and fair. In conferral with Plaintiff, Defendants have stipulated the requested response should be limited to *Calone*.

Dated this 18th day of June, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I served the attached **DEFENDANTS' UNOPPOSED MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN RESPONSE TO PLAINTIFF'S UNAUTHORIZED FILING** on:

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- By mailing to said attorney(s) a full and correct copy therefor, contained in a sealed envelope, with postage paid, addressed to said attorney(s) as stated above and deposited in the United States Post Office at Salem, Oregon.
- By hand delivering to said attorney(s) a true copy thereof.
- By emailing to said attorney(s) at their above listed email address(es) a true copy thereof.
- By electronic filing with the District Court's CM/ECF system. The CM/ECF system generated Notice of Electronic Filing constitutes proof of service upon a Filing User in accordance with Fed. R. Civ. P. 5(d).

Dated this 18th day of June, 2024.

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